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SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

Index No. 27279/2011
Orig. Date: 3/31/2014
Adj. Date: 8/12/2014
002: MotD

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RAPHAEL AVIDGOR,

Orig. Date: 6/24/2014
Adj. Date: 8/12/2014
003: Xmot.D

Plaintiff(s),

-against-

ORDER GRANTING, IN PART, MOTION FOR A DEFAULT JUDGMENT AND DENYING CROSS MOTION TO DISMISS

PHENOMENA WASH, LTD., d/b/a SAVVY CAR WASH, and MARK FENICK, individually,

Defendant(s).

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Upon consideration of the Notice of Motion for a default judgment against the defendants Phenomena Wash, Ltd. d/b/a Savvy Car Wash and Mark Fenick, Individually [collectively "the defendants"], the supporting affirmation, the Verified Complaint, and exhibits 1 through 5 and A through D, (motion sequence 002), the Notice of Cross Motion for an order dismissing the complaint of the plaintiff Raphael Avigdor ["the plaintiff"], or alternatively, for leave to answer the complaint, the supporting affirmation and affidavit and exhibits A through H, (motion sequence 003), the plaintiff's affirmation in opposition to the cross motion, and the defendants' reply affirmation, it is now

ORDERED that so much of the plaintiff's motion for a default judgment against the defendant Mark Fenick ["Fenick"] is denied without prejudice to renew in accordance herewith; and it is further

ORDERED that so much of the plaintiff's motion for a default judgment against the defendant Phenomena Wash, Ltd. d/b/a Savvy Car Wash is granted; and it is further

ORDERED that so much of the defendants' cross motion seeking an order dismissing the complaint against both defendants pursuant to CPLR 3215 (c) is denied; and it is further

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ORDERED that so much of the defendants' cross motion seeking an order dismissing the complaint pursuant to CPLR 3211 (a) (7) against defendant Fenick is denied; and it is further

ORDERED that so much of the defendants' cross motion seeking an order dismissing the complaint against defendant Fenick pursuant to CPLR 3211 (a) (8) is reserved pending a hearing on the issue of personal service on defendant Fenick; and it is further

ORDERED that so much of the defendants' cross motion seeking an order dismissing the complaint against defendant Phenomena Wash, Ltd. d/b/a Savvy Car Wash pursuant to CPLR 3211 (a) (8) is denied; and it is further

ORDERED that so much of the defendants' motion that seeks leave to answer the complaint is denied; and it is further

ORDERED that the attorneys for the parties are directed to appear for a conference on **FEBRUARY 9, 2015**, at **9:30AM** at One Court Street Annex, Riverhead, New York to schedule a traverse with respect to defendant Fenick; and it is further

ORDERED that upon a determination of whether personal jurisdiction was obtained over defendant Fenick, the matter will be calendared for an inquest on damages against either defendant Phenomena Wash, Ltd. d/b/a Savvy Car Wash, or Phenomena Wash, Ltd. d/b/a Savvy Car Wash and Mark Fenick, Individually.

According to the plaintiff's affidavit in support of the application for a default judgment, on August 22, 2008, a vehicle being leased by the plaintiff was stolen from the Savvy Car Wash located at 173-12 Horace Harding Expressway, Fresh Meadows, New York. Although insurance proceeds covered the value of the stolen vehicle, numerous items of personalty within the leased vehicle, including the plaintiff's laptop containing a manuscript-in-progress, were never recovered or replaced by insurance.

The plaintiff commenced the action for negligence on August 19, 2011, three days before the expiration of the applicable period of limitations. The corporation was served pursuant to BUS. CORP. LAW § 306, by service on an authorized agent, on September 6, 2011. A principal of the corporation denied ever receiving a copy of the summons and complaint in the mail, although he apparently had no personal knowledge as to whether someone else at the subject premises received a copy in the mail.

An affidavit of service indicates that defendant Mark Fenick was personally served with the summons and complaint on September 14, 2011, although Fenick likewise denied 1) service of the complaint upon him, or 2) that he was an employee of Phenomena Wash, Ltd. d/b/a Savvy Car Wash either on the date of loss or on the date he was purportedly served with the complaint

more than three years later. Rather, in an affidavit Fenick insists he was employed by a separate corporate entity, albeit at the same location, and was never served with the summons and complaint or with any other legal documents pertaining to this lawsuit before receiving a copy of the motion for a default.

In any event, slightly more than one year from the date that the defendants were obliged to answer, the plaintiff made an ex parte application for a default judgment against both defendants which was denied (LaSalle, J.), with a direction from the Court to proceed with the default motion on notice in an order dated November 14, 2012. The plaintiff did not move for a default judgment until sixteen months later in March of 2014.

The plaintiff's motion for a default judgment as to Phenomena Wash, Ltd. d/b/a Savvy Car Wash is granted. On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to file proof of (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant's default (*see* CPLR 3215[f]). If, as is the case here with respect to Phenomena Wash, Ltd., the defendant is a domestic corporation and was originally served with the summons and complaint by personal delivery to the Secretary of State (*see* BUS. CORP. LAW § 306[b]), a plaintiff is also required to serve the defendant a second time, by first-class mail at its last known address (*see* CPLR 3215[g] [4][I]). To demonstrate "the facts constituting the claim" the movant need only submit sufficient proof to enable a court to determine that "a viable cause of action exists" (*Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71, 760 N.Y.S.2d 727, 790 N.E.2d 1156; *see Alterbaum v. Shubert Org., Inc.*, 80 A.D.3d 635, 636, 914 N.Y.S.2d 681; *Neuman v. Zurich N. Am.*, 36 A.D.3d 601, 602, 828 N.Y.S.2d 169).

To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense (*see Wassertheil v. Elburg, LLC*, 94 A.D.3d 753, 753, 941 N.Y.S.2d 679; *New Seven Colors Corp. v. White Bubble Laundromat, Inc.*, 89 A.D.3d 701, 702, 931 N.Y.S.2d 899; *Wells Fargo Bank, N.A. v. Cervini*, 84 A.D.3d 789, 789, 921 N.Y.S.2d 643; *cf.* CPLR 5015[a] [1]; *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8, 492 N.E.2d 116). Whether a proffered excuse is "reasonable" is a "sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 876–877, 800 N.Y.S.2d 613; *see Zanelli v. JMM Raceway*, LLC, 83 A.D.3d 697, 697, 919 N.Y.S.2d 878; *Grinage v. City of New York*, 45 A.D.3d 729, 730, 846 N.Y.S.2d 300; *Greene v. Mullen*, 39 A.D.3d 469, 469–470, 833 N.Y.S.2d 215).

Here, the plaintiff satisfied his CPLR 3215 burden of proving service, the facts constituting the claim, and the defendant's default notwithstanding that the original ex parte

application to fix the defendants' respective defaults was made one year and fifteen days after both defaults (*see Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d at 71, 760 N.Y.S.2d 727, 790 N.E.2d 1156; *Jackson v. Professional Transp. Corp.*, 81 A.D.3d 602, 603, 916 N.Y.S.2d 159; *see also* CPLR 3215[c]). The one exception to the otherwise mandatory language of CPLR 3215(c) is that the failure to seek a default on an unanswered complaint or counterclaim within one year of the default may be excused if "sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215[c]). The Second Department has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious (*Giglio v. NTIMP, Inc.*, 86 A.D.3d 301, 308, 926 N.Y.S.2d 546 [2d Dept. 2011]). The plaintiff here has met both requirements.

With respect to the individual defendant, Fenick, the affidavit of service dated September 16, 2011, in which a process server attested to personally delivering a copy of the summons and complaint on September 14, 2011, to defendant Fenick at his admitted place of business constitutes prima facie evidence that service was properly made on him pursuant to CPLR 308(1) (*see Wisselman, Harounian & Assoc., P.C. v. Dowlah*, 117 A.D.3d 822, 984 N.Y.S.2d 880; *Academic Fed. Credit Union v. Duhe*, 116 A.D.3d 721, 982 N.Y.S.2d 891). A "bare and unsubstantiated" denial of receipt of process is normally insufficient to raise any issue of fact in this respect (*Deutsche Bank Natl. Trust Co. v. Quinones*, 114 A.D.3d 719, 719, 981 N.Y.S.2d 107).

Here, the significant differences in the description of Fenick in the process server's affidavit of service and Fenick's affidavit require a hearing (*see Bank of N.Y. v. Espejo,* 92 A.D.3d 707, 939 N.Y.S.2d 105; *Bankers Trust Co. of California, NA v. Tsoukas,* 303 A.D.2d 343, 756 N.Y.S.2d 92 [2d Dept. 2003]). Therefore, the motion for a default as to Fenick is denied at this time pending the outcome of a hearing to determine whether he was personally served with process.

With respect to the denial of service by the corporate defendant, the affidavit of the general manager to the effect that he personally never received a copy of the summons and complaint from the Secretary of State and "to [his] knowledge, a copy was never received by anyone at Phenomena Wash, Ltd. is insufficient to rebut the presumption of service (*Levine v. Forgotson's Cent. Auto & Elec., Inc.,* 41 A.D.3d 552, 840 N.Y.S.2d 598 [2d Dept. 2007]). Thus, as to the corporate defendant the motion for a default judgment is granted and the cross motion to dismiss the complaint pursuant to CPLR 3211 (a) (8), and/or for leave to serve and file a late answer, is denied.

So much of Fenick's cross motion seeking an order dismissing the complaint for failure to state a cause of action is likewise denied. On a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the court must afford the pleading a

liberal construction, accept the facts alleged in the pleading as true, accord the pleader the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d 83, 87; *Lizjan, Inc. v. Sahn Ward Coschignano & Baker, PLLC*, 117 A.D.3d 914, 915). "[E]videntiary material may be considered to 'remedy defects in the [pleading]' " (*Dana v. Shopping Time Corp.*, 76 A.D.3d 992, 994, *quoting Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636; *see Leon v. Martinez*, 84 N.Y.2d at 88; *Way v. City of Beacon*, 96 AD3d 829, 830–831). Applying these well settled principles, the Court concludes that so much of the cross motion seeking to dismiss the complaint against Fenick must be denied.

Dated: December 11, 2014

ANDREW G. TARANTINO, JR., A.J.S.C.